

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE HARDIN,

Defendant-Appellant.

UNPUBLISHED

May 12, 2005

No. 252878

Wayne Circuit Court

LC No. 03-008125-01

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions on four counts of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and felony firearm, MCL 750.227b. We affirm.

On appeal, defendant argues that he was denied his constitutional rights to due process of law and a fair trial by the prosecutor's misconduct. We disagree. Because defendant failed to preserve his several claims of misconduct by proper objection, our review is for plain error that affected his substantial rights. See *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Generally, prosecutors are afforded great latitude regarding their arguments and conduct and are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor may not unfairly place issues into the trial that are more comprehensive than a defendant's guilt or innocence or that encourage jurors not to make a reasoned judgment. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

First, defendant claims that the prosecutor made several improper comments that personally attacked his counsel, bolstered or vouched for the credibility of prosecution witnesses, improperly played to the sympathies of the jury, or expressed her personal opinion on defendant's guilt. We have reviewed the comments in context and reject these claims. In sum, that the prosecutor made "a snide comment" in response to a defense objection did not amount to a personal attack that denied defendant a fair trial. See *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). The question on re-direct examination, following a lengthy

cross-examination regarding the witness' identification of defendant, as to whether the witness was "100 percent sure" that defendant was the shooter did not constitute improper bolstering that denied defendant a fair trial. Comments made during closing argument by the prosecutor regarding the credibility of her witnesses did not imply special knowledge of their truthfulness but was proper argument. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor's brief description of the injuries to one of the victims was not an improper attempt to appeal to the jury's sympathy that denied defendant a fair trial, particularly in light of the charges. See *People v McRunels*, 237 Mich App 168, 181-182; 603 NW2d 95 (1999). And, the prosecutor's reference during closing argument that defendant was "the right person here" was made in the context of a review of applicable law and the evidence presented to show that she met her burden of proof and was not an improper personal opinion. See *Bahoda*, *supra* at 282-283.

Second, defendant claims that the prosecutor improperly introduced "misleading and inflammatory" evidence regarding defendant's identification. Defendant argues that testimony relating to the police department's use of "Fox 2 News" to obtain information about the identity of the man in a still photo taken from Starter's Lounge (SL) improperly implied that the still photo shown on the news was the shooter in action, when in fact the still photo only depicted defendant entering the restaurant. Defendant also alleges that the prosecutor purposely implied throughout the trial that two of the victims picked defendant out of the line-up as the shooter, when in fact they only picked defendant out of the line-up as the man they threw out of SL just before the shooting. These arguments are vague, unsupported by the record, and unsupported by any legal theory or basis, and thus, we deem them abandoned. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). But, even if we considered these arguments, we would conclude that defendant failed to establish plain error. Defense counsel had an opportunity to cross-examine the witnesses regarding their testimony and did establish on cross-examination that one of the witnesses picked defendant out of the line-up as the man who was thrown out of SL, and not as the shooter.

Third, defendant's argument that the prosecutor committed misconduct by failing to provide to defense counsel the complete surveillance footage taken at SL also fails. Defense counsel received a copy of the videotape a few days before trial. Even if we assume that this did not satisfy defense counsel's discovery request, defendant has failed to show that the non-production was outcome determinative and, thus, has failed to establish that he was denied a fair trial or that reversal is required. See *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000).

Next, defendant argues that he was denied the effective assistance of counsel. We disagree. Because the issue was not preserved and a *Ginther*¹ hearing was not conducted, our review is limited to mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). A trial counsel's decisions concerning which questions to ask a witness, what evidence to present and whether to call or question witnesses are presumed to be sound trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to present additional evidence only constitutes ineffective assistance of counsel when it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant claims that his trial counsel was ineffective for several reasons, including for failing to properly object to the admission of the surveillance videotape, as well as to the photographs and medical records of one of the victims. But, defense counsel vigorously objected to the admission of the videotape on several grounds, including that it was unfairly prejudicial. The objection was sustained and resulted in the redaction of identifying information contained at the beginning of the videotape. Defense counsel also objected to the admission of the photographs and the objection was sustained in part, resulting in the admission of only one photograph into evidence and defendant admits that such admission was harmless. And, admission of the victim's medical records was not outcome determinative, in light of the victim's testimony as to all of her injuries. Therefore, defendant has failed to establish his ineffective assistance claim on these grounds.

Defendant also claims that his trial counsel was ineffective for (1) failing to make a double hearsay objection to Officer Werts' verbatim reading of a witness' description of defendant given to his partner, (2) failing to object to Officer Young's testimony concerning his observations of the lineup, (3) failing to object to Riley Singleton's "hearsay" testimony relating what the man in the brown jacket said as defendant was being escorted out of SL, and (4) failing to object to "the prosecutor's multiple improper comments in her closing argument, set forth *supra*." None of these claims warrant relief. First, Werts' verbatim reading of a witness' description of defendant constituted sound trial strategy under the circumstances. Defendant's primary defense strategy was to attack the credibility of witnesses' identification of defendant. This initial description given by the witness, as read by Officer Werts, differed from another witness' description given at trial, thus, by allowing this evidence, defense counsel was attempting to strengthen his defense. Second, Officer Young's testimony illustrating the fairness of the line-up, from his personal observations, was proper. Third, even if Singleton's challenged testimony included inadmissible hearsay, it is not reasonably probable that, but for counsel's errors, the outcome of the trial would have been different. See *Toma, supra*. Fourth, as previously discussed, the challenged statements made by the prosecutor during closing argument were not improper so an objection would have been futile. Therefore, defendant has failed to establish his ineffective assistance claims on these grounds.

Defendant also claims that his trial counsel was ineffective for failing to conduct adequate cross-examination of prosecution witnesses Derrick Parker and Singleton. But, the

record establishes that defense counsel vigorously cross-examined these witnesses, particularly with regard to their respective identifications of defendant. Defendant claims that his counsel should have cross-examined Singleton as to his inconsistent preliminary examination testimony in regard to what the man in the brown jacket said but his counsel's cross-examination did establish the inconsistencies; thus, this claim is without merit and defendant has failed to establish his ineffective assistance claims on these grounds.

Finally, defendant claims that his trial counsel was ineffective for failing to call any witnesses on his behalf—particularly the line-up attorney, and for failing to raise any sort of defense. As discussed *supra*, defense counsel's main defense was to attack the credibility of the witnesses' identification of defendant. Defendant does not indicate what other defense(s) should have been raised by defense counsel and has not indicated how such defense(s) would have changed the outcome of the case. Thus, defendant has failed to overcome the presumption that defense counsel's actions were sound trial strategy or that the failure to call witnesses or present another defense deprived defendant of a substantial defense that would have affected the outcome of the proceedings. Therefore, we cannot conclude that counsel's actions in this regard denied defendant his constitutional right to the effective assistance of counsel. See *Rockey, supra*; *Daniel, supra*.

Defendant next argues the trial court abused its discretion when it admitted into evidence an edited and enhanced surveillance videotape produced by the Michigan State Police. After reviewing the decision for an abuse of discretion, we disagree. See *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

All relevant evidence is admissible, except as otherwise provided by the constitutions, rules of evidence, or other rules of the Supreme Court. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Relevant evidence is evidence which has any tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.* Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. *Id.* Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id.* at 521-522.

A defendant's identification as the perpetrator of a crime and the credibility of witnesses are material facts, and thus, evidence which has a tendency to make the existence of a defendant's identification or a witness' credibility more probable or less probable than it would be without the evidence is relevant. *People v Mills*, 450 Mich 61, 72-74; 537 NW2d 909, modified and remanded 450 Mich 1212 (1995); *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Here, the central issue of the case was the identification of the shooter. Defendant never admitted that he was at SL. Singleton, Michael Greene and Parker testified that defendant was at SL and was thrown out of SL minutes before the shooting took place. Furthermore, Parker testified that he was working the door and saw defendant come back in shortly after he was thrown out, pull out a gun and start shooting. The videotape shows Parker working the door, defendant entering SL, defendant being removed from SL and defendant coming back to SL with a gun. Parker testified that the videotape accurately represented the scene and that the lighting in the room was very consistent with the lighting represented by the

tape. Thus, the videotape is relevant to show the identification of defendant and to establish the credibility of the aforementioned testimony by showing that defendant was at SL.

Defendant argues that the videotape was “far more prejudicial than probative” because it contained only those portions that the police wanted shown and it was cumulative because witnesses had already testified that defendant was present at the restaurant. Defendant’s argument that the tape is merely cumulative fails. Physical evidence is not rendered inadmissible merely because witnesses can orally testify to the same subject matter captured by the physical evidence. *Mills, supra* at 76. Moreover, physical evidence can be used to corroborate witnesses’ testimony. *Id.* Here, the videotape is not being used to inflame the minds of the jurors and prejudice them against defendant, but rather, to further show defendant was present at SL the night of the incident by corroborating the witnesses’ testimony and to strengthen the credibility of the aforementioned witnesses’ testimony. Defendant has done nothing to rebut Parker’s testimony that the video accurately depicted the night’s events. Therefore, since the video is accurate, relevant, and not merely cumulative, we conclude that the trial judge did not abuse his discretion when he allowed the videotape into evidence.

Finally, defendant claims that the combination of errors mandate reversal and remand for a new trial but this claim fails because defendant has not established the occurrence of any errors. See *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin